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No. 97-2063

In The

Supreme Court of the United States

October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF NATIONAL CONFERENCE OF INSURANCE LEGISLATORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

(Filed In Support Of State Farm Mutual Automobile Insurance Company)

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Conference of Insurance Legislators ("NCOIL") hereby moves for leave to file the attached brief *amicus curiae* in support of a petition by State Farm Mutual Automobile Insurance Company ("State Farm") for a writ of certiorari. NCOIL has obtained State Farm's consent to the brief's filing, but one of the respondents, the Honorable John Speroni, has informed the parties that he will neither grant nor withhold consent to the filing of any briefs *amici curiae*.

NCOIL is an association of state legislators whose purpose is to advance the ability of each state legislature to regulate insurance business practices. The interest of NCOIL in this case arises from NCOIL's desire to preserve the traditional primacy of state insurance regulation through judicial affirmation that no state may regulate insurance practices beyond its own borders.

In the petition for a writ of certiorari, State Farm challenges *inter alia* the constitutionality of an attempt, through certification of a nationwide class-action lawsuit, to apply Illinois state law to insurance business practices in 47 other states. In the attached brief *amicus curiae*, NCOIL submits that such extraterritorial regulation is not only unconstitutional, it also violates the McCarran-Ferguson Act, in which Congress established the primacy of state insurance regulation by delegating to each state the power to regulate insurance business practices within its borders.

As lawmakers to whom Congress has delegated regulatory power, the members of NCOIL bring to this case a

different perspective than that of State Farm and are well-positioned to provide supplemental briefing on the McCarran-Ferguson issue, which is introduced in the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF NATIONAL CONFERENCE OF INSURANCE LEGISLATORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The National Conference of Insurance Legislators ("NCOIL") submits this brief *amicus curiae* in support of a petition for a writ of certiorari by State Farm Mutual Automobile Insurance Company ("State Farm") on the issue whether a state may, through certification of a nationwide class action, regulate insurance business practices beyond its own borders. This brief is accompanied by a motion for leave to file it, for lack of consent by one of the parties.[1]

State Farm challenges the certification of a nationwide class action in Illinois state court. The plaintiffs allege that State Farm's practice of sometimes specifying the use of automobile parts manufactured by sources other than the original equipment manufacturer ("non-OEM parts") when adjusting damage claims constitutes a breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The Illinois court has certified a class of some five million State Farm policyholders residing in 48 states.

NCOIL submits that the McCarran-Ferguson Act, as interpreted in *Federal Trade Commission v. Travelers Health*

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

Association, 362 U.S. 293 (1960) ("*Travelers Health*"), precludes Illinois from regulating insurance practices extraterritorially through the device of nationwide class certification, and that such regulation is not only prohibited by Congress, it is unconstitutional. The McCarran-Ferguson Act establishes the primacy of state insurance regulation, delegating to each state regulatory power over insurance business practices. National policy favors *severalty*, not forced uniformity, in state regulation of the insurance industry. The nationwide class certification in this case contravenes *Travelers Health*, for it threatens such severalty by skewing the primacy of state insurance regulation in favor of a single state, and even makes it impossible for a national insurer to comply with the law of one state without violating the law of another.

The number of nationwide insurance providers is increasing and will continue to do so in the near future. National banks are now authorized to sell insurance, and a bill pending in Congress – which expressly reaffirms the efficacy of the McCarran-Ferguson Act – would substantially regulate such sales. The time is ripe for this Court to clarify the Congressional and constitutional limits on the territorial reach of state insurance regulation and bring nationwide class actions in line with *Travelers Health*.

THE INTEREST OF *AMICUS CURIAE*

Amicus curiae NCOIL is an association of state legislators who have joined together to advance the ability of

each state legislature to regulate insurance business practices. One of NCOIL's purposes, as set forth in its Articles of Organization, is to "reaffirm the traditional primacy of the States in the regulation of insurance." In NCOIL's view, the rule of individual state primacy will be impaired if, through certification of a nationwide class-action lawsuit against an insurance provider, a state can regulate insurance practices beyond its own borders. NCOIL's interest arises from its desire to preserve state primacy through judicial affirmation that no state may regulate insurance practices extraterritorially.

ARGUMENT

I.

THE NATIONWIDE CLASS CERTIFICATION CONTRAVENES THIS COURT'S INTERPRETATION OF THE McCARRAN-FERGUSON ACT AS PRECLUDING A STATE FROM REGULATING INSURANCE PRACTICES BEYOND ITS BORDERS.

A. The McCarran-Ferguson Act Delegates To "The Several States" The Power To Regulate Insurance Practices.

Congress enacted the McCarran-Ferguson Act (15 U.S.C. § 1011 et seq.) in 1945, in the wake of a ruling by this Court that Congress has the power to regulate interstate insurance practices. See *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The Act delegates to each state regulatory power over insurance business practices, pursuant to a declaration of

Congressional policy that "continued regulation and taxation by the several States of the business of insurance is in the public interest. . . . " 15 U.S.C. § 1011. The heart of the Act is 15 U.S.C. § 1012(a), which provides, "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

The McCarran-Ferguson Act also provides that the Sherman Act, the Clayton Act and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). Thus, the federal antitrust and trade laws will apply to insurance practices that the states do not or cannot regulate.

B. No State May Regulate Insurance Practices Beyond Its Own Borders.

In *Travelers Health*, 362 U.S. 293, this Court held that the McCarran-Ferguson Act permitted the Federal Trade Commission ("FTC") to regulate interstate mail order sales of health insurance from the Omaha office of a Nebraska corporation – despite a Nebraska statute purporting to prohibit unfair or deceptive insurance practices in Nebraska or "in any other state" – because the Act did not allow Nebraska to regulate *extraterritorially*. The Court said that, from the legislative history of the Act, "it is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders."

Travelers Health, 362 U.S. at 300. The Court explained that no single state could assume primacy over any other state in insurance regulation:

> One of the major arguments advanced by the proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government. . . . Such a purpose would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union.

Travelers Health, 362 U.S. at 302 (citations omitted).

The Court in *Travelers Health* based its decision solely on interpretation of the McCarran-Ferguson Act, declining to consider the constitutional questions presented by a state's attempt to regulate insurance practices beyond its borders. The Court made clear, however, that there are substantial constitutional as well as Congressional obstacles to extraterritorial regulation: "Suffice it to note that the impediments, contingencies, and doubts which constitutional limitations might create as to Nebraska's power to regulate any given aspect of extraterritorial activity serve only to confirm the reading we have given to [§ 1012(b)] of the Act." *Travelers Health*, 362 U.S. at 302.

Since *Travelers Health*, lower federal courts have consistently held that the McCarran-Ferguson Act precludes extraterritorial state regulation of insurance practices. For example, in *In re Insurance Antitrust Litigation*, 938 F.2d 919, 928 (9th Cir. 1991) *aff'd in part and rev'd in part sub*

nom. Hartford Fire Insurance Co. v. California, 509 U.S. 921 (1993), the court said "established law blocks regulation by one state of the United States of the insurance business outside the borders of that state." In *Hamilton Life Ins. Co. v. Republic Nat. Life Ins. Co.*, 291 F. Supp. 225, 232 (S.D.N.Y. 1968), *aff'd*, 408 F.2d 606 (2d Cir. 1969), the court relied on *Travelers Health* to conclude that "[t]he legislative history of [§ 1012(b)] strongly substantiates the proposition that a State is not empowered to regulate interstate insurance practices which have their situs outside its borders." Accord, *Page v. Liberty Mutual Fire Ins. Co.*, 869 F. Supp. 596, 599 (N.D. Ill. 1994); *American Gen. Ins. Co. v. Fed. Trade Comm'n*, 359 F. Supp. 887, 895 (S.D. Tex. 1973); *United States v. Chicago Title & Trust Co.*, 242 F. Supp. 56, 60 (N.D. Ill. 1965); *In re Aviation Insurance Industry*, 183 F. Supp. 374, 380 (S.D.N.Y. 1960).

In *Seasongood v. K & K Ins. Agency*, 548 F.2d 729, 738 (8th Cir. 1977), where a Missouri insurance agent sued an entity with affiliates in many states including Missouri, the court said that *Travelers Health* "specifically cautions against giving preemptive effect" to extraterritorial state regulation, and thus precluded the court from giving "nationwide preemptive effect to Missouri law." *Seasongood* concluded: "Just as Travelers' presence in Nebraska did not warrant nationwide deference to the laws of Nebraska, defendants' presence in Missouri does not warrant nationwide deference to the laws of Missouri." *Seasongood*, 548 F.2d at 739 (footnote omitted).

Likewise, State Farm's presence in Illinois (as well as every other state) does not warrant nationwide deference to Illinois law regulating an insurer's specification of non-OEM parts. Yet nationwide class certification has

precisely such extraterritorial effect, for it makes transactions between State Farm and policyholders outside Illinois subject to the Illinois Consumer Fraud and Deceptive Business Practices Act.

The McCarran-Ferguson Act delegates regulatory power equally to "the *several* States" (15 U.S.C. § 1011 (emphasis added)) – not to one state above all others. Congress has declared the primacy of a State's regulation of insurance practices, *but only within that state's borders.* The notion that a single state can assume such primacy over all *other* states, through the device of certifying a nationwide class action, undermines this country's federal composition of "one nation as to foreign concerns" but "distinct in domestic ones." Jefferson, *Letter to James Madison, Dec. 16, 1786,* in The Life And Selected Writings Of Thomas Jefferson (Koch & Peden ed. 1993) at 377.

Travelers Health did not hold *directly* that the states may not regulate insurance practices extraterritorially. The holding was that the McCarran-Ferguson Act permitted FTC regulation in that case because the Act was not intended to permit extraterritorial state insurance regulation, and thus FTC regulation was permitted because the insurer's activity outside Nebraska was "not regulated by State law." 15 U.S.C. § 1012(b); see *Travelers Health,* 362 U.S. at 295, 301-302. But the *Travelers Health* opinion was only one step short of its interpretation by the lower federal courts that the Act affirmatively precludes extraterritorial regulation, as well as the conclusion that such regulation is unconstitutional (violating the Commerce Clause and the Full Faith And Credit Clause). The time has come for this Court to take that final step in a case where these issues are squarely presented.

C. Congressional Policy Favors Severalty In State Regulation Of Insurance Practices.

When enacting the McCarran-Ferguson Act, "Congress must have had full knowledge of the nation-wide existence of state systems of [insurance] regulation and taxation; of the fact that they *differ greatly* in the scope and character of the regulations imposed and of the taxes exacted. . . . " *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 430 (1946) (emphasis added). Congress meant to *preserve* this severalty – leaving each state free to go its own way in regulating the insurance industry – because forced uniformity of insurance regulation is *not* in the public interest.

The present case exemplifies such severalty in state insurance regulation. Thirty-six states have taken seven different approaches to insurer specification of non-OEM parts. One state, Massachusetts, requires use of non-OEM parts. Another state, Hawaii, strongly encourages such use by requiring policyholders to pay the price differential if they insist on receiving OEM parts. Twenty-five states permit use of non-OEM parts upon disclosure to the policyholder. Three states permit use without disclosure. Two states permit use with the policyholder's consent. Three states require consent during a limited time period. One state requires consent for certain types of non-OEM parts. There are even sub-catagories of different treatment within these seven categories. See State Farm's Petition For A Writ Of Certiorari at 12 n.7.

Class-action certification threatens State Farm with extraterritorial regulation by Illinois, presenting State Farm with an unsolvable dilemma. If State Farm is

required to specify the use of non-OEM parts in Massachusetts but in doing so can be held liable for violating Illinois law, State Farm can do no right in Massachusetts. State Farm will violate Illinois law by specifying non-OEM parts, yet will violate Massachusetts law by not doing so. This is precisely the sort of conundrum that the rule against extraterritorial regulation is intended to prevent.

The McCarran-Ferguson Act permits the states to indulge, not inhibit, the different approaches to regulation exemplified here. The nationwide class certification order threatens such severalty by skewing the primacy of state insurance regulation in favor of a single state, Illinois, above all others.

II.

THE NEED FOR SUPREME COURT REVIEW LOOMS LARGER AS THE NUMBER OF NATIONWIDE INSURANCE PROVIDERS CONTINUES TO INCREASE.

Now more than ever before, insurance is commonly sold by multi-state companies. This trend will continue. In 1996, this Court held that the states may not prohibit *national banks* from selling insurance. *Barnett Bank v. Nelson*, 517 U.S. 25 (1996) (federal preemption of state statute prohibiting national banks from selling insurance in a small town). Subsequently, the office of the Comptroller of the Currency issued an advisory letter providing guidance to national banks on insurance sales. Office of the Comptroller of the Currency, Advisory Letter 96-8 (Oct. 8, 1996). A bill now before Congress, the Financial Services Act of 1998, would substantially regulate such

sales. H.R. 10, 105 Cong. § 304 et seq. (1998). The bill would also express Congressional intent that the McCarran-Ferguson Act "remains the law of the United States." H.R. 10, 105 Cong. § 301 (1998).[2]

With the proliferation of multi-state insurance providers, with national banks joining their ranks, and with the McCarran-Ferguson Act once again at the fore of the national agenda, the time is ripe for this Court to give its imprimatur to Congress's 53-year-old policy against extraterritorial state regulation of insurance practices – and, if necessary, to decide the constitutionality of such regulation.

These issues will elude the Court unless certiorari is granted interlocutorily at the class-certification stage. Without immediate Supreme Court review, State Farm will be under "intense pressure to settle" (*Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995)) in order to avoid a potentially devastating judgment. That is commonly the fate – indeed, the goal – of high-stakes nationwide class-action lawsuits. The name of the game is "blackmail" (*id.* at 1298), and it works – though, unfortunately, often more to the benefit of class counsel (who can reap millions in fees) than to their clients (who might get little more than scrip for a future purchase). For this Court to review the issue whether a state may regulate insurance practices extraterritorially, through nationwide class-action certification, it's a matter of "now or never."

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[2] H.R. 10 was passed by the House of Representatives on May 13, 1998, and the next day was referred to the Senate Committee on Banking, where it is currently pending.

CONCLUSION

As urged in State Farm's petition for a writ of certiorari, the Court should grant the petition and summarily reverse the judgment below or, in the alternative, order plenary briefing and argument.

Respectfully submitted,

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